Supreme Court U.S.
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No. 02-88

IN THE

Supreme Court of the United States

AUDIO ODYSSEY, LTD., DOGAN A. DINCER, and ANN M. DINCER,

Petitioners,

v.

BRENTON FIRST NATIONAL BANK, an Iowa Banking Corporation, MICHAEL M. BLADEL, Sheriff of Scott County, Iowa, JOHN M. NORRIS, Deputy Sheriff of Scott County, Iowa, CHARLES A. BARTON, Deputy Sheriff of Scott County, Iowa, JOHN C. BRADLEY, CHRIS A. PIEPER, MERCHANTS BONDING COMPANY (Mutual), BERNARD J. HOFMANN, and ANDERSON & NELSON, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Brenton First National Bank is a wholly owned subsidiary of Wells Fargo and Company.

None of the remaining Respondents has a parent company and no publicly held company owns 10% or more of the stock of either such respondent.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
A. Course of Proceedings	1
B. Statement of the Facts	3
C. Perceived Misstatements of Fact in Petition	5
Reasons for Denying the Writ	8
I. The Court Should Decline To Exercise Certiorari Jurisdiction In This Case Because Petitioner Was The Successful Party In The Eighth Circuit Court Of Appeals And There Is No Compelling Reason To Do So	8
II. The Petition Should Be Denied Because This Case Does Not Satisfy The Criteria Set Out In Rule 10 Concerning Grounds For Exercising Certiorari Jurisdiction	10

Contents

Page

A. The Opinion of the Court of Appeals Holding that the Iowa Replevin Statute is Constitutional is Consistent with Supreme Court Cases Concerning Prejudgment Repossession Remedies .. 11

B. The Iowa Replevin Statute Provides the Due Process Safeguards Required by *Fuentes* and its Progeny 13

III. The Court Should Decline To Review Petitioner's Arguments Regarding Service Of Original Notice Because Petitioner Did Not Preserve Error On This Issue And Even If It Had, The Argument Must Fail 17

A. Petitioner Has Not Preserved Error ... 17

B. Iowa and Federal Law Do Not Require Service of an Original Notice Prior to a Prejudgment Writ of Replevin 18

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) ... 17

American Construction Co. v. Jacksonville, T & K.R. Co., 148 U.S. 372 (1893) 9

Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327 (1967) 9-10

Daniels v. Williams, 474 U.S. 327 (1986) 18

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 17

Deposit Guaranty National Bank v. Roper, 45 U.S. 326 (1980) 9

Douglas Oil of California v. Petrol Stops Northwest, 441 U.S. 211 (1979) 10

Fisher v. Keller Industries, Inc., 485 N.W.2d 626 (Iowa 1992) 19, 20

Fuentes v. Shevin, 407 U.S. 67 (1972) .. 10, 11, 12, 13, 14

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 10

Interfirst Bank of Dallas v. Hanson, 395 N.W.2d 857 (Iowa 1986) 11

Cited Authorities

	Page
Marler v. Missouri State Bd. of Optometry, 102 F.3d 1453 (8th Cir. 1996)	16
Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)	12, 13, 14, 16, 18
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)	12
Parratt v. Taylor, 451 U.S. 527 (1981)	18
Public Service Commission v. Brashear Freight Lines, Inc., 306 U.S. 204 (1939)	9
Thomas v. Hansen, 524 N.W.2d 145 (Iowa 1994)	19
Thorp Credit, Inc. v. Barr, 200 N.W.2d 535 (Iowa 1972)	10
Watertown Equipment Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487 (8th Cir. 1987)	14
United States Constitution:	
Fourth Amendment	8

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254 10

28 U.S.C. § 1254(1) 9, 10

42 U.S.C. § 1983 ..... 2, 3, 8

Iowa Code § 4.7 19

Iowa Code § 643 ..... 3, 19

Iowa Code § 643.1 13

Iowa Code § 643.2 ..... 15, 18

Iowa Code § 643.5 ..... 13, 19

Iowa Code § 643.6 14

Iowa Code § 643.7 14

Iowa Code § 643.10 13

Iowa Code § 643.12 14

Cited Authorities

Page

Rules:

Iowa R. Civ. Pro. 1.302 ..... 17, 18

Iowa R. Civ. Pro. 1.431 15

U.S. Supreme Court Rule 10 ..... 9, 10

Other Authority:

R. Stern, E. Gressman, S. Shapiro & K. Gellar, Supreme Court Practice 45 (7th Ed. 1993) 9

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

This case arises from a replevin action executed against Petitioner,[1] Audio Odyssey, an Iowa electronics store. On July 14, 1995, a writ of replevin was obtained in Scott County, Iowa district court by attorney Bernard J. Hofmann, on behalf of Brenton First National Bank. The writ was executed by the Scott County Sheriff's Department. Audio Odyssey Ltd., and Dogan and Ann Dincer, as Plaintiffs, filed two separate actions arising from the execution of the writ of replevin. Both complaints were filed in the United States district court for the northern district of Iowa. One cause of action was against Bernard J. Hofmann and Anderson & Nelson P.C. (Law Firm Defendants). The other cause was against Brenton First National Bank, two Brenton Bank employees and Brenton's bonding company (collectively the Bank), the Sheriff of Scott County and two sheriff's deputies (Scott County Defendants), and Roger Hoffman, a loan officer for the Small Business Association (United States Defendant). The district court granted Roger Hoffman's motion to dismiss by order filed December 15, 1997. The district court also dismissed the Dincers' individual claims against the Law Firm Defendants for lack of standing by order filed December 15, 1997. The district court dismissed the Dincers' individual claims against the Scott County Defendants for lack of standing by order filed June 2, 1998. The two cases were consolidated on motion of Audio Odyssey and the Dincers on June 30, 1999.

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1. Petitioner refers to "Petitioners," which would include Dogan S. Dincer and Ann M. Dincer. The individual Plaintiffs were dismissed; the only proper Petitioner is accordingly Audio Odyssey.

Petitioner's complaint included claims against all parties for unconstitutional deprivation of property pursuant to 42 U.S.C. § 1983. Additionally, Petitioner alleged the unconstitutionality of the Iowa replevin statute. The complaint also included state law claims, including trespass, conversion, abuse of process, tortious interference with contractual relations, failure of the Bank to act in a commercially reasonable manner, and other Uniform Commercial Code claims.

All defendants moved for summary judgment. By order filed October 13, 1999, the district court granted the Scott County Defendants' and the Law Firm Defendants' motions for summary judgment on all counts. The district court ruled Audio Odyssey and the individual Plaintiffs were not deprived of any constitutional rights, that the Scott County Defendants were entitled to good faith immunity, and that Audio Odyssey had failed to establish any cause of action against these Defendants. The district court further found the Iowa replevin statute constitutional both facially and as applied. By order filed January 21, 2000, the district court granted the Bank's motion for summary judgment on all federal claims and declined to exercise supplemental jurisdiction over the remaining state law claims. Judgment was entered in favor of all Defendants on January 25, 2000.

Audio Odyssey appealed the order of the district court. By a decision filed April 6, 2001 (hereinafter panel decision), the Eighth Circuit Court of Appeals, before Loken and Bye, circuit judges, and Sachs, district judge, affirmed in part, reversed in part, and remanded for further proceedings. The panel decision affirmed the district court's finding that the Dincers lack individual standing to sue. It affirmed the

constitutionality of the Iowa replevin statute and affirmed the finding that the seizure of Petitioner's personal property comported with due process. The panel decision reversed the district court's grant of summary judgment on Petitioner's section 1983 claims and good faith immunity. The panel decision affirmed the grant of summary judgment on all other counts. All parties petitioned for a rehearing en banc. Defendants' petition was granted. The April 10, 2002, en banc reconsideration by the Eighth Circuit reinstated the panel decision in all respects, further clarifying that the initial execution of the writ of replevin was constitutional. The court held, en banc, however, the continued holding of the real property may be an unconstitutional deprivation and this issue was remanded to the district court for further proceedings.

B. STATEMENT OF THE FACTS

On July 14, 1995, Bernard J. Hofmann, as attorney for the Bank, filed a petition for writ of replevin requesting the seizure of property from the business, Audio Odyssey Ltd. He appeared before a Scott County, Iowa District Court judge, who entered a replevin order. A bond was posted in accordance with Iowa Code Chapter 643 on behalf of the Bank. The clerk of court issued a writ of replevin.

Attorney Hofmann took the writ of replevin to the Scott County sheriff's department and spoke with Sergeant Charles A. Barton. Hofmann requested service of the writ and that a deputy be sent to Audio Odyssey, meet with bank officer, John C. Bradley, and seize the property immediately. The writ "ordered and commanded" the Sheriff of Scott County to take from the possession of Audio Odyssey, Ltd., and deliver into the possession of Brenton First National

Bank "all inventory, fixtures, accounts, furniture, equipment and machinery on property described as follows:

> 4,050 square feet located at 1718 E. Kimberly Road, Davenport, Iowa, legally described as: Part of the Northwest Quarter of the Southwest Quarter of Section 18, Township 78, Range 4, East of the 5th P.M. . . . to the City of Davenport, Scott County, Iowa.

Attorney Hofmann completed a "Directions to Sheriff' form, directing the Sheriff: "if possible serve Dogan Dincer, President of Corporation — contact John Bradley at Brenton Bank, 323-3368 — he will meet you at store with a locksmith."

At approximately 4 p.m. on July 14, 1995, Scott County Sheriff's Deputy John Norris was dispatched to Audio Odyssey to serve the writ of replevin. He met with the Bank's representative, John Bradley. Before serving the writ, Deputy Norris read the replevin order and writ, and then compared them with the directions to sheriff in an effort to determine the items and method of seizure.

Deputy Norris then went to the location and served Dogan Dincer, President of Audio Odyssey, with the order and writ of replevin. At the store, a locksmith hired by the Bank was waiting. Deputy Norris requested all employees to leave the premises after allowing them to gather their personal belongings. Deputy Norris then allowed the locksmith to change the locks, thereby securing the store.

The following week, all of the property on the premises, furniture, equipment and machinery, were inventoried,

removed and turned over to the Bank in the care of John C. Bradley. Although Audio Odyssey had an attorney at all material times, and apparently consulted with many other attorneys, it did not pursue any procedural nor statutory protections to resist or halt the replevin action until August 4, 1995, when it moved to dismiss the replevin action. The state court replevin action was subsequently settled by Audio Odyssey and the Bank and dismissed. Petitioner subsequently filed lawsuits as described in the "Course of Proceedings" above.

C. PERCEIVED MISSTATEMENTS OF FACT IN PETITION

Petitioner's "Statement of the Case" is argumentative. Many of the issues raised do not pertain to the Petition for Writ of Certiorari. Other statements misrepresent the facts.

At page two of the Petition, Petitioner states, "the bank through its attorney, directed the Sheriff's deputies to seize the real property itself and locked the plaintiffs out of their business which the deputies did." At no point did anyone direct the deputies to "seize real property." The locks were changed on the building as a method to secure the attached property until it could be inventoried and removed. The writ of replevin was extensive, requiring seizure of "all inventory, fixtures, accounts, furniture, equipment and machinery on property described as follows: [legal description of the real estate]." The locking of the building was a method for attaching the personal property. Although the practical effect may be the same, it was never the intent of any party to knowingly seize the real estate.

At page two, Petitioner states: "No original notice was issued by the replevin plaintiffs and served on the replevin defendants until almost one month after the ex parte seizure." The issue of documents that were served is in dispute. Discrepancies exist as to the method and nature of documents served.

Petitioner states, at page three "42 U.S.C. § 1983 allows for causes of action whenever plaintiffs are deprived of constitutional rights under color of state law, which clearly occurred here." This statement is argumentative, and disputed by Respondents. The decision that the issuance of the writ of replevin and its initial execution was constitutional has been affirmed by the Eighth Circuit Court of Appeals.

Respondents dispute Petitioner's description of the Eighth Circuit's opinion as contained in the second paragraph on page three. This issue was remanded for further proceedings.

The third paragraph on page three of the Petition is not a fact statement. It is a legal argument disputed by Respondents.

Respondents dispute the statement in the last paragraph on page three of the Petition and continuing on page four pertaining to the underlying events leading to the replevin action. Prior to the replevin petition being filed, the Bank had concerns that the Small Business Association loan was being used improperly, including for payment of delinquent taxes. In addition, Dogan Dincer was continually writing checks on the Audio Odyssey account when there were not sufficient funds in the account. Audio Odyssey was in default on its loan. The Bank was concerned that collateral for the loan was at risk. The Bank had received a notice that the

insurance policy on the collateral had been cancelled. It also received a copy of a letter from Audio Odyssey's consultant criticizing Dincer for "willful disregard for commonly accepted business principles."

The last paragraph on page five of the Petition states only part of the facts. Although Audio Odyssey had procedural remedies available, including the posting of a bond to halt the replevin and motion practice pursuant to the Iowa Rules of Civil Procedure, no such actions were taken by Petitioner until almost three weeks after the execution of the replevin. Petitioner's failure to act has never been explained.

Petitioner states in the last paragraph on page five "the Bank, *in effect*, (emphasis added) admitted that there was no exigent circumstances justifying the ex parte replevin." This statement is argumentative and misstates the facts as no such admission has been made by the Bank.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DECLINE TO EXERCISE CERTIORARI JURISDICTION IN THIS CASE BECAUSE PETITIONER WAS THE SUCCESSFUL PARTY IN THE EIGHTH CIRCUIT COURT OF APPEALS AND THERE IS NO COMPELLING REASON TO DO SO

Although Petitioner fails to make it clear in its Petition, Audio Odyssey was the successful party in the Eighth Circuit. The Court of Appeals in *Audio Odyssey, Ltd. v. Brenton First National Bank*, 286 F.3d 498 (8th Cir. 2002), sitting *en banc*, held, in a plurality decision, that the county Respondents, pursuant to 42 U.S.C. § 1983, violated Audio Odyssey's Fourth Amendment right to be free from illegal seizure. In doing so, the Court of Appeals reinstated the panel decision, *Audio Odyssey, Ltd. v. Brenton First Nat'l Bank*, 245 F.3d 721 (8th Cir. 2001), which had reversed the district court's grant of summary judgment as to all Respondents.[2] The Eighth Circuit Court of Appeals remanded the case for a trial on the merits.

2. The panel decision held as follows: (1) the individual Plaintiffs, shareholders of Audio Odyssey, did not have standing to seek redress for emotional and reputational injuries that they sustained as result of the Bank's alleged wrongful ex parte seizure; (2) the Iowa replevin statute did not violate due process either on its face or as applied; (3) the seizure of debtor's real property that occurred, when officers acting pursuant to writ of replevin that authorized them to seize specific items of personal property from debtor's store had entered premises, ordered those inside to leave, and arranged for locks to be changed, violated Fourth Amendment; (4) officers were not entitled to qualified immunity; (5) loan officer who had authorized the Bank to accelerate loan and seek replevin was not liable under § 1983; and (6) county and county sheriff were likewise not liable, on failure to train theory, for Fourth Amendment violation. *See Audio Odyssey, Ltd.*, 245 F.2d at 721-739.

Although 28 U.S.C. § 1254(1) permits "any party" to a case in the Court of Appeals to apply for a writ of certiorari, it would be a waste of judicial resources for this Court to grant certiorari where the Petitioner has received its requested relief, i.e., a trial on the merits and the opportunity to seek damages. This Court has, on a number of occasions, declined to exercise its appeal jurisdiction where the party seeking relief has received that which was sought in the Court of Appeals. *See Deposit Guaranty National Bank v. Roper*, 45 U.S. 326, 333 (1980) (holding that party in lower court who received all that he has sought is generally not aggrieved by a final judgment and therefore cannot appeal it). *See also Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (holding successful party below had no standing to appeal from an order denying an injunction.). Given the discretionary nature of certiorari review, and the limitations of Supreme Court Rule 10, which provides that "[a] petition for writ of certiorari will be granted only for compelling reasons," the Court should decline to exercise its certiorari jurisdiction where Petitioner has prevailed, the case has been remanded, and Petitioner has the opportunity to seek relief and damages.[3]

Finally, Petitioner is seeking certiorari prior to final judgment. As this Court stated in *American Construction Co. v. Jacksonville, T & K.R. Co.*, 148 U.S. 372, 384 (1893), the Supreme Court should decline to issue a writ of certiorari prior to final judgment "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *See also Brotherhood of Locomotive*

3. Indeed "it would appear that there is no reported case where the court has . . . granted a petition filed by a party who prevailed on the merits in the Court of Appeals." R. Stern, E. Gressman, S. Shapiro & K. Gellar, Supreme Court Practice 45 (7th Ed. 1993).

Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . And, except in extraordinary cases, the writ is not issued until final decree.") Here, the case has been remanded to the district court for a determination on the merits of Petitioner's claims.[4] Accordingly, the Court should decline to exercise its certiorari jurisdiction and dismiss the Petition.

II.

THE PETITION SHOULD BE DENIED BECAUSE THIS CASE DOES NOT SATISFY THE CRITERIA SET OUT IN RULE 10 CONCERNING GROUNDS FOR EXERCISING CERTIORARI JURISDICTION

Petitioner suggests the Iowa replevin statute conflicts with the U.S. Supreme Court's decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972) and the Iowa Supreme Court's decision in *Thorp Credit, Inc. v. Barr*, 200 N.W.2d 535 (Iowa 1972). In particular, Petitioner asserts the statute is invalid because it allows the *ex parte* issuance of a prejudgment replevin writ without service of an original notice. Petitioner also

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4. Therefore the case is not "in" the Court of Appeals, which is essential for certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1), which is the jurisdiction Petitioner has invoked. *See Douglas Oil of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979) (explaining that in order for Supreme Court to have jurisdiction pursuant to Section 1254, the case must be "in" the Court of Appeals).

argues without citation, the statute is defective because it does not require a prompt post-deprivation hearing; the replevin defendant cannot post bond after the turnover of property to the replevin plaintiff; and the replevin plaintiff may dismiss its case prior to final judgment. Petitioner's arguments are without merit.

A. The Opinion of the Court of Appeals Holding that the Iowa Replevin Statute is Constitutional is Consistent with Supreme Court Cases Concerning Prejudgment Repossession Remedies.

As Petitioner correctly points out, the current Iowa replevin statute was enacted in 1972 to correct constitutional defects made apparent by the Supreme Court's decision in *Fuentes*. In 1986, the Iowa Supreme Court noted the post-*Fuentes* statute meets the requirements of due process. *See Interfirst Bank of Dallas v. Hanson*, 395 N.W.2d 857, 860 (Iowa 1986).

The Iowa replevin scheme also satisfies constitutional requirements under *Fuentes'* progeny. In *Fuentes*, the Court invalidated two state replevin laws allowing the summary seizure of household goods and chattel upon a private party's mere *ex parte* application and posting of a bond. *Fuentes*, 407 U.S. at 69-70, 96. Although the statutes allowed the defendants to request a post-seizure hearing, the Court concluded the statutes lacked adequate due process in that prejudgment repossession was allowed without notice, hearing, or judicial supervision. *Id.* at 93. A party only had to make a request to the court clerk, who could issue a writ to be executed by the sheriff. *Id.*

Two years after *Fuentes*, the Court clarified both its holding in *Fuentes* and the requirements of the due process clause in the context of a pre-judgment remedy. In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the Court held the due process clause was not violated by a Louisiana statute allowing the issuance of a sequestration writ to recover household goods *without* notice and hearing. The Court noted that unlike the statutes considered in *Fuentes*, the Louisiana law incorporated the following procedural protections: (1) the party seeking issuance of the writ could not rely on bare, conclusory claims of ownership but had to make specific allegations showing its entitlement to the writ in a verified petition; (2) the requisite showing had to be made to a judge and judicial authorization obtained; and (3) a sufficient bond had to be filed by the party to protect the debtor against all damages should the sequestration have been improper. *See Mitchell*, 416 U.S. at 616-17. The Court also noted the Louisiana law permitted the debtor to regain possession of the property by putting up his own bond and entitled the debtor to an immediate postdeprivation hearing following execution of the writ. *Id.* at 618. In *Mitchell*, the Court reiterated the principle that due process requirements are neither "technical" nor necessitate any "particular form of procedure," and that creditor remedy schemes must be considered "as a whole." *Id.* at 610.

The year after the Court decided *Mitchell*, the Court considered the constitutionality of yet another state prejudgment remedy law. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Court invalidated a Georgia statute allowing the issuance of a writ of garnishment by a court clerk. *Id.* at 607. The Court noted that unlike the Louisiana law upheld in *Mitchell*, the Georgia statute did not require judicial participation and allowed the

writ to be issued upon an affidavit containing only conclusory allegations. *Id.* Also, the debtor could not challenge the garnishment, in a postdeprivation hearing or otherwise, without first filing a bond. *Id.* The Court identified the "saving characteristics" of a prejudgment remedy statute to include the following requirements: (1) a verified petition showing facts, rather than conclusory allegations, supporting the replevin action; (2) judicial oversight, where the application was presented without notice; (3) the posting of a bond; and (4) entitlement by the debtor to an immediate hearing on the issue of possession. *Id.* at 605-607.

B. The Iowa Replevin Statute Provides the Due Process Safeguards Required by *Fuentes* and its Progeny.

As the Eighth Circuit correctly held, Iowa law provides the extensive due process safeguards outlined in *Fuentes* and its progeny. To bring a replevin action in Iowa, the plaintiff must file a verified petition stating more than just conclusory allegations. The petition must identify facts describing the property; its value; the basis for the plaintiff's right to present possession of the property; the extent of its interest in the property; and the alleged cause of detention thereof according to the plaintiff's best belief. *See* Iowa Code § 643.1. The law requires judicial supervision over the replevin, providing that a clerk shall issue a writ "upon direction of the court after notice and opportunity for such hearing as it may prescribe." Iowa Code § 643.5.

Once the writ is issued, an officer must execute the writ by taking possession of the property described in the writ. *See* Iowa Code § 643.10. To obtain immediate delivery of the property by the officer, the plaintiff must provide for indemnification of the debtor for a wrongful attachment by

filing a bond in a penalty at least equal to twice the value of the property sought to be taken and if a return is awarded, pay all costs and damages that may be adjudged against the plaintiff. *See* Iowa Code §§ 643.6, 643.7. The debtor may also obtain immediate return of any property taken by the sheriff by posting its own bond. *See* Iowa Code § 643.12.

Contrary to Petitioner's assertion, Iowa law also allows for a replevin defendant to obtain an immediate post-deprivation hearing. It must be noted *Mitchell* does not require such a hearing, but merely the *opportunity* for a hearing at the request of the injured party. *Mitchell*, 416 U.S. at 609. A statute need not specify when a post-deprivation hearing must occur if the language can be interpreted as providing for an immediate hearing. *See id.* at 622; *Watertown Equipment Co. v. Norwest Bank Watertown, N.A.*, 830 F.2d 1487, 1492 (8th Cir. 1987).

Nor does the availability of such a hearing need to be specified in the replevin statute itself. Petitioner argues *Fuentes* "implicitly held" general motion practice is not a substitute for a provision in a replevin statute providing for a post-deprivation hearing. (Petitioner's Brief at p. 7, nn.2, 14). *Fuentes* held no such thing. *Fuentes* merely observed the two state replevin laws at issue in that case allowed the replevin defendant to initiate a post-seizure hearing pursuant to civil procedure rules. *Fuentes*, 407 U.S. at 78, n.9. The statutes were not invalidated as a result of this procedural mechanism, but rather because prejudgment repossession was allowed without notice, hearing, or judicial supervision. *See Id.* at 93.

Iowa law may be readily interpreted to provide for the postdeprivation hearing Petitioner alleges must be available.

Iowa Code § 643.2 provides replevin actions shall be tried by "ordinary proceedings", which incorporate general motion practice under Iowa Rule of Civil Procedure 1.431. Pursuant to Rule 1.431, a debtor may file an immediate motion to void or vacate the writ and obtain a prompt hearing. Although Petitioner complains the state did not hold an evidentiary hearing until five weeks after the writ was executed (Petitioner's Brief at 5), this delay cannot be attributed to Iowa's replevin laws. Nor can Petitioner complain it was prejudiced by the fact the replevin statute only appears to allow a debtor to post a bond for immediate return of the property before the sheriff has released the property to the replevin plaintiff. The Sheriff did not turn the replevied property over to the Bank until five days after execution of the writ. Petitioner could have attempted to timely post a bond to have the property returned but did not. Nor did it promptly request a hearing after execution of the writ. As the district court noted:

> Mr. Dincer indicated in his deposition that he had hired an attorney — the one representing him in this action — within three days of July 14, 1995, the date the order and writ were issued. Dincer Depo. at 195. Audio Odyssey did not move to dismiss the replevin action until early August 1995. In noting this, the Court has no intent to question plaintiffs' counsel's strategy or methods; rather, plaintiff repeatedly complains that the premises were locked until late August, 1995, and the Court believes this appears to have occurred at plaintiffs' option. Additionally, Mr. Dincer testified that he could have obtained capital to cover the loan, if the Bank had afforded him an opportunity. Presumably, he could also readily

> obtain capital to post a bond and regain possession of personal property. Again, this is a postdeprivation option he chose not to exercise. The court cannot find the replevin procedure unconstitutional simply because plaintiffs made strategic decisions which postponed opportunity to repossess the merchandise.

(Appendix D, p. 102a).

Iowa law affords procedural protections to a debtor to challenge a prejudgment replevin. The fact a debtor did not "actually utilize [the] procedures does not mean that he was denied due process, because the Due Process Clause requires merely a meaningful *opportunity* to be heard." *Marler v. Missouri State Bd. of Optometry*, 102 F.3d 1453, 1457 (8th Cir. 1996).

The Eighth Circuit concluded Iowa's replevin scheme passes constitutional muster because it contains the necessary procedural safeguards. *See Audio Odyssey, Ltd.*, 245 F.3d at 731-735. As the Supreme Court stated when it determined Louisiana's sequestration statute was constitutional, "the initial hardship to the debtor is limited, the seller has a strong interest, the process proceeds under judicial supervision and management, and the prevailing party is protected against all loss." *Mitchell*, 416 U.S. at 618-19.

III.

THE COURT SHOULD DECLINE TO REVIEW PETITIONER'S ARGUMENTS REGARDING SERVICE OF ORIGINAL NOTICE BECAUSE PETITIONER DID NOT PRESERVE ERROR ON THIS ISSUE AND EVEN IF IT HAD, THE ARGUMENT MUST FAIL

A. Petitioner Has Not Preserved Error

Petitioner argues the district court lacked jurisdiction over the replevin action because the bank did not serve an "original notice" of the action pursuant to Iowa Rule of Civil Procedure 1.302 (formerly Rules 49, 50 and 52) prior to obtaining the writ of replevin. This alleged error has not been preserved for review.

Although Petitioner made brief reference to the timing of the original notice in the facts sections of its Resistances to Respondents' Summary Judgment Motions and facts section of its Brief supporting its Eighth Circuit appeal, Petitioner did not argue to either the district court or the Eighth Circuit that non-compliance with the Iowa civil procedure rules relating to original notices deprived the court of jurisdiction or violated Iowa law. A question presented in a petition for writ of certiorari which was not raised in the Court of Appeals is not properly before this Court. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). As a matter of law, Petitioner's arguments as to any perceived deficiency in the original notice have been waived and cannot be considered for the first time on appeal to this Court.

B. Iowa and Federal Law Do Not Require Service of an Original Notice Prior to a Prejudgment Writ of Replevin.

Contrary to Petitioner's assertions, as discussed in Section II above, prior notice of a writ of replevin in particular is not necessary so long as other procedures are in place to guarantee protection against erroneous seizures. *See Mitchell*, 416, U.S. at 605-606. *Mitchell* specifically held the lack of a notice requirement is not fatal where other procedural protections (such as those found in the Iowa law) are present. *Mitchell*, 416 U.S. at 616. So long as the State provides postdeprivation remedies, the "normal predeprivation notice and opportunity to be heard is pretermitted." *Parratt v. Taylor*, 451 U.S. 527, 538 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Similarly, Petitioner's arguments regarding original notice requirements under Iowa law and the attendant alleged lack of personal jurisdiction are misplaced. First, as stated in Respondents' Statement of Facts, the record is not clear as to whether original notice was served with the writ of replevin. Second, even assuming an original notice was not served at the time the writ was served, such oversight did not divest the court of personal jurisdiction over Petitioner under Iowa Rule of Civil Procedure 1.302 (formerly Rules 49, 50 and 52).

Rule 1.302 provides notice of an action that has been filed be served upon a defendant. Such notice is called "original notice." *See* Iowa R. Civ. Pro. 1.302. Petitioner argues that because Iowa Code § 643.2 provides for trial of a replevin action by "ordinary proceedings", strict compliance with Rule 1.302's notice provisions is necessary. However,

Iowa Code § 643.5 specifically excepts compliance with this rule in cases where a replevin plaintiff obtains a prejudgment writ of replevin and complies with Chapter 643's other procedural safeguards. Iowa law dictates this narrow exception override the general rule:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision.

Iowa Code § 4.7. This rule of statutory interpretation requires the specific notice provisions of the replevin statute apply in place of the more general notice provisions of the Iowa Rules of Civil Procedure.

Finally, Petitioner's claim of defective notice must fail under a case cited by them, *Fisher v. Keller Industries, Inc.*, 485 N.W.2d 626 (Iowa 1992), *overruled on other grounds by Thomas v. Hansen*, 524 N.W.2d 145 (Iowa 1994). In *Fisher*, the plaintiff workers' compensation carrier filed suit to claim a lien on a third-party recovery obtained by an injured worker. *Fisher*, 485 N.W.2d at 627. Although the carrier provided a copy of the Petition to the defendant, the carrier did not serve an original notice. *Id.* In response to the Petition, the defendant filed a motion to dismiss alleging the failure to serve the notice yet claiming entitlement to immediate distribution of the third-party judgment. The court rejected the defendant's argument the lack of an original notice deprived the court of personal jurisdiction. *Id.* at 628. Rather, the court held, the defendant's filing of a Motion to Dismiss requesting affirmative relief constituted his

voluntary appearance and submission to the court, negating the need for service of process of an original notice. *Id.* at 628. The court explained:

> Challenges to the district court's personal jurisdiction may now be asserted in a pre-answer motion, in the answer, or in an amendment to the answer made within twenty days after service of answer. Abolition of the special appearance does not change the basic and universal rule that there are only two ways to acquire personal jurisdiction: (1) by service of process on the defendant; or (2) by defendant's voluntary appearance and submission.
>
> . . . .
>
> Hartford moved to dismiss Fisher's application for declaratory judgment because it had not been served with original notice. But in the same motion Hartford prayed for affirmative relief, claiming it was "entitled by clear provisions of statutory law to immediate distribution of the proceeds of the third-party judgment. . . ."
>
> Hartford cannot have it both ways, challenging jurisdiction and in the same motion asking the court to exercise jurisdiction in its favor. We agree with Fisher that this constituted a general appearance and a submission to jurisdiction.

Id. at 628.

Similarly, in this case, on August 4, 1995, three weeks after the filing of the replevin petition and prior to the Bank's service of an original notice, Petitioner filed a motion to dismiss, claiming it had not been served with original notice. However, in that same motion it prayed for affirmative relief, claiming it was entitled to an order requiring the sheriff to return all seized property and to preserve the bond filed by the Bank. It also concurrently filed a Jury Demand. By making this prayer for affirmative relief, Petitioner submitted to jurisdiction and waived any claim of irregularity in the service of an original notice.

Accordingly, even if preserved, Petitioner's argument must fail.

CONCLUSION

Petitioner was the successful party in the Court of Appeals and the case has been remanded for a decision on the merits on Petitioner's Claims. Further, Petitioner has presented no "compelling reason" for the Supreme Court to exercise its certiorari jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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